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In the
Supreme Court of the United States

OCTOBER TERM, 1987

RALPH G. FAGAN

Defendant-Petitioner

versus

UNITED STATES OF AMERICA

Plaintiff-Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the trial court should have severed Counts 1 through 12 of the Indictment charging mail fraud from Counts 13 and 14 of the Indictment charging tampering with a witness and interstate communication of a threat respectively. More specifically, whether Counts 1 through 12 are of a dissimilar character to Counts 13 and 14 and whether the joinder of counts is prejudicial to the defendant's right to a fair trial.

2. Whether the evidence supports a finding of "a scheme and artifice to defraud Texoma" as required by the language of 18 U.S.C. 1341 as alleged in the Indictment. Simply put, whether Texoma was being defrauded?

3. Whether the United States Court of Appeals, Fifth Circuit, correctly applied the holding of the United States Supreme Court in *McNally vs. U.S.*, _____ U.S. _____, 107 S.Ct. 2875 (1987), in rendering its decision on the mail fraud counts.

4. Whether the court violated the "best evidence" rule by permitting, over the objection of the defense, Deputy Sheriff Chris Boudreau to testify to the content and substance of a tape-recorded statement given by the defendant, Ralph G. Fagan, when the government had available to it both the tape-recording of the statement and a transcript of it.

5. Whether factually and legally defendant, Ralph G. Fagan, is responsible or accountable for the conduct of government

witness Thomas Henry Woolsey during a conversation which was initiated in interstate commerce by government witness Donald Riley who was at the time cooperating with the Federal Bureau of Investigation. More specifically, with respect to Counts 13 and 14 of the Indictment, is defendant, Ralph G. Fagan, accountable for the conduct of government witness Thomas Henry Woolsey's agreeing to a bribe requested by government witness Donald Riley who was at the time an individual cooperating with the prosecution in collecting and creating the evidence which constitutes the offense charged in Counts 13 and 14 of the Indictment?

PARTIES TO THE PROCEEDINGS

All of the parties to these proceedings are listed in the caption of the case.

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PETITION FOR WRIT OF CERTIORARI

Ralph G. Fagan, your petitioner, prays that a Writ of Certiorari issue to review the judgment and the decision of the United States Court of Appeals, Fifth Circuit, which affirmed convictions of your petitioner on nine counts of mail fraud, 18 U.S.C. 1341, one count of transmitting a threat in interstate commerce, 18 U.S.C. 875(b).

OPINIONS BELOW

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT. The opinion of the United States Court of Appeals, Fifth Circuit, bears the style and citation as follows: United States

of America vs. Ralph G. Fagan, No. 86-2284 (5th Cir., 1987). A copy of the opinion is appended to this petition and made a part hereof. (See Appendix A)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS. The trial judge did not write or render a general comprehensive opinion. He made oral rulings which are found at various places throughout the transcript.

JURISDICTION

The judgment and opinion of the United States Court of Appeals, Fifth Circuit, was rendered and entered on June 30, 1987. (See Appendix A). Petitioner filed a timely Petition for Rehearing which was denied on August 10, 1987.

The jurisdiction of this Court is envoked under the provisions of 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. 1341

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever

to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

18 U.S.C. 2

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Fed. Rules Evid. Rule 1002, 28 U.S.C.A.

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by act of Congress.

Also, see 18 U.S.C. 875(b) and 18 U.S.C. 1512(a) at Appendix E.

STATEMENT OF THE CASE

Ralph G. Fagan, defendant–petitioner, was convicted of nine counts of mail fraud, the factual basis of each being almost identical except for the alleged dates of mailing. In each case, a payment was allegedly mailed to a named co-defendant, Donald Riley,

who, by agreement with the government, pleaded guilty before the trial and testified. Ralph G. Fagan had been in the "boat business" since about 1969 or 1970. He had operated in this business both as a boat broker and as an owner of boats, dealing primarily with oil companies conducting offshore drilling operations. For tax and other legitimate business reasons, some of his operations were operated in corporate names. One of his customers was Texoma Production Company. Since the initial charters were not brokered through an outsider, no brokerage fee was charged or included in the charter price. Fagan and his corporations were doing business with Texoma Production Company in early 1981 when Ralph Fagan met government witness, Donald Riley, who, at the time, was drilling superintendent for Texoma Production Company. Fagan was introduced to Donald Riley by Ken Waters who, at the time, was an officer — probably vice-president — of Texoma Production Company. Fagan continued to furnish boat services and boat crews to Texoma Production Company until sometime in the summer of 1982. He had about eight boats and crews working with Texoma Production Company during this period of time. No brokerage fee or commissions were being paid on these boats to anyone.

Agreement to pay C & D Consultants:

Sometime in the summer of 1982, Donald Riley, who was now drilling manager for Texoma Production Company, met with Ralph Fagan in Louisiana and told Fagan in substance that he, Donald Riley, wanted one hundred dollars per day for each boat which Fagan or his corporations had working for Texoma Production Company. At first, Fagan did not want to go along with this arrangement. He already had business with Texoma Production Company and there would be no basis for paying brokerage fees or commission since it was not new business. At this time, Donald

Riley did not make any threat to discontinue Fagan's boat business. However, about a week later, one boat was shutdown and about another week later, on the weekend, three additional boats were shutdown. Fagan was led to believe that these three additional boats were shutdown by Jeffrey Hughes, a co-defendant who was tried with him but who at the time was drilling superintendent for Texoma Production Company under Donald Riley's supervision as drilling manager. Fagan then called Donald Riley Monday morning and asked him what the deal was. In effect, Fagan was told that he, Donald Riley, could help Fagan but that he, Fagan, had to help him, Donald Riley. This was when the agreement for the payment of one hundred dollars per day for the boats to continue working resulted. This information was not presented by direct testimony at the trial. It was presented, in part, by the government's introduction of a prior complaint which Ralph Fagan made against Donald Riley in criminal proceedings in the State of Louisiana.

Trial testimony of Donald Riley alleges that the offer for one hundred dollars per day came from Ralph Fagan but that both Fagan and Riley agreed that the prices had to be competitive, that Texoma's interest would be first and at all times the interest of Texoma would be paramount. Thus, there are two versions of the facts pertaining to this case based on the evidence which was adduced.

Fagan did not increase the price on his boats to Texoma Production Company and continued under the contract or agreement that existed between him and Texoma Production Company. He decided that he would absorb the loss of the one hundred dollars per day per boat.

The twelve checks referred to in Counts 1 through 12 of the Indictment totaling approximately one hundred seventy-five thou-

sand dollars were paid by Fagan's corporations to C & D Consultants as directed by Donald Riley. Fagan did not know at that time that the prior year Riley had already run substantial sums of money through the C & D Consultants' account which he, Riley, obtained from other vendors of Texoma Production Company. C & D Consultants and its bank account had been set up for approximately one year prior to the time that Fagan was required to begin making payments to continue contracts he already had with Texoma Production Company. Fagan learned of this from Riley only after Riley had been fired by Texoma Production Company.

Payments were not made on all of the boats used by Texoma Production Company. Also, some payments were at a sum less than one hundred dollars per day. Fagan's corporation treated these payments as business expenses and provided and filed I.R.S. 1099 forms on these payments. Fagan's corporations treated these payments the same as if the boats had been brokered by C & D Consultants except that they *did not pass the cost on to Texoma.*

Contact with Woolsey:

With respect to Counts 13 and 14 of the Indictment, Ralph Fagan did know Thomas Henry Woolsey. Riley introduced Fagan and Woolsey on the telephone. Fagan discussed with Woolsey whether he could obtain any boat rental contracts and indicated that he would pay the customary brokerage fee which ranges from fifty dollars and one hundred dollars per day. He saw Woolsey at several of the social gatherings for people involved in the oil industry. Woolsey talked with Fagan about securing contracts with Columbia Gas and Sammy Dan, either of which would have been substantial. Woolsey also discussed several other companies.

After Texoma Production Company began firing its

employees and instituted Civil Suit Number H-83-6773 in the United States District Court for the Southern District of Texas in a case entitled "Texoma Production Company versus Ralph Fagan" — the case referred to in Counts 13 and 14 of the Indictment — many knowledgeable people in the oil industry knew of Donald Riley's role with vendors of Texoma Production Company. It was information which was "on the street." Woolsey, in this manner, was aware of Riley's role and Fagan's situation.

The gist of the government's case with respect to Counts 13 and 14 of the Indictment is a statement attributed to Fagan by Woolsey to the effect that he said "I will pay twenty thousand dollars for a no-show on Riley." At no time did Fagan say to Woolsey, "I will pay twenty thousand dollars for a no-show on Riley." At no time did Fagan intend or request that Woolsey kill or secure the death of Riley. Riley had already given at least one deposition in the civil suit. He had already made other sworn statements and given a deposition in another civil suit dealing with another Texoma vendor. The deposition given in the Texoma suit would have been admissible in the absence of Riley at the trial.

On or about December 26, 1984, Woolsey made a visit to Riley's home. This was done entirely without prior knowledge by Fagan. Woolsey did call Fagan from the Riley home on that date. Woolsey appeared to Fagan to be under the strong influence of alcohol at the time. Fagan did not agree with Woolsey in that or any other conversation at any time for Woolsey to make any threat to Riley or to offer him any sum of money to fail to appear as a witness in the civil suit.

Fagan did not know in advance that Woolsey was going to offer any sum of money to Donald Riley.

In any event, immediately after Woolsey's visit to Riley's

home, Riley began cooperating with the F.B.I. and provoked and engaged in two telephone conversations with Woolsey. In essence, two government witnesses, Donald Riley and Thomas Henry Woolsey, engaged in conversation monitored, supervised, and encouraged by the F.B.I on December 28, 1984 and December 30, 1984. In that conversation, Donald Riley, who was then working for the F.B.I., requested the sum of fifty thousand dollars not to testify. Thomas Henry Woolsey agreed to get that sum from Ralph Fagan. Immediately after that conversation between Riley and Woolsey, Woolsey called the defendant, Fagan, who specifically told him not to have anything to do with Donald Riley. Fagan did not authorize Woolsey to offer fifty thousand dollars or any other sum of money to Riley.

At no time after December 30, 1984, did Riley contact Fagan to see whether he, in fact, had anything to do with the so called fifty thousand dollar deal not to show up.

Woolsey was indicted in the United States District Court for the Western District of Louisiana for essentially the conduct alleged in Counts 13 and 14 of the Indictment in the instant case.

Prior to trial, Ralph Fagan filed pre-trial motions, including a request for severance of counts. Because of the dissimilar character of Counts 1 through 12 as opposed to Counts 13 and 14, because of the prejudicial affect of a joinder of counts and because of important strategy considerations which affected the defendant's ability to testify at the trial, he sought a severance of counts. The trial judge overruled this request but suggested that it be reurged at a later state of the trial. It was. Each time that it was urged it was overruled.

At the conclusion of the case and prior to sentencing, a

Motion for New Trial and a Motion in Arrest of Judgment which urged, among other things, certain of the pre-trial motions which had been before the court and additionally, new reasons which identified why the defendant was unable to testify at the trial were filed. Counsel for the defense, with government concurrence, requested an *in camera* hearing because of the sensitive nature of information which would have to be made available to the court. The Motion for *In Camera* Hearing was denied and in a very rapid fashion the Motion in Arrest of Judgment and Motion for New Trial were overruled without evidence.

After sentencing of the defendant to two years on each of the counts, all to run concurrently with each other, an appeal was taken to the United States Court of Appeals for the Fifth Circuit.

The United States Court of Appeals, Fifth Circuit, issued a judgment affirming the District Court (See Appendix B) and denied Fagan's Petition for Rehearing on August 10, 1987. (See Appendix C)

ARGUMENT

1. Severance of Counts

Prior to trial of defendant, Ralph G. Fagan, sought to invoke Federal Rule of Criminal Procedure, Rule 8, and moved for a severance of counts. Specifically, he moved to sever from the proceedings and trial with respect to Counts 1 through 12 of the Indictment from the proceedings and trial with respect to Counts 13 and 14 of the Indictment. He affirmatively alleged that Counts 1 through 12 of the Indictment were not of the same or similar character or based on the same act or transaction as Counts 13 and

14. More specifically, he alleged that the joinder of Counts 1 through 12 with Counts 13 and 14 was prejudicial to his right to a fair trial. In essence, defendant Fagan wanted to separate the trial of the twelve counts dealing with alleged mail fraud from the two counts dealing with alleged tampering with or communicating a threat to a witness. Significantly, at a pre-trial detention hearing conducted before United States Magistrate Brown on December 30, 1985, defendant Fagan testified with respect to Counts 13 and 14 of the Indictment (the Woolsey matter) only on the condition that he reserve his Fifth Amendment privilege against testifying with respect to Counts 1 through 12 (the mail fraud allegations). The Magistrate permitted this limitation and defendant Fagan testified at that pre-trial hearing. Partly as a consequence of his testimony he was admitted to bail pending trial. It was the opinion of defendant Fagan and his attorneys that he should testify at any trial or proceeding relating to Counts 13 and 14 (the Woolsey matter) but not at any proceedings or trials relating to Counts 1 through 12. Thus, the prejudicial effect of the joinder is not theoretical. It is practical and real. The refusal of the trial judge to grant the severance of counts precluded defendant Fagan from testifying at the trial on the merits. Further amplification of the reasons why he did not testify at the pre-trial detention hearing or at the trial with respect to Counts 1 through 12 are set out in paragraphs 3 and 4 of the Motion for New Trial and would have been further amplified upon had the court permitted the *in camera* hearing requested.

Rule 8 (a) of the Federal Rules of Criminal Procedure provides:

> "(a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate court for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or

> transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan."

Rule 14 of the Federal Rules of Criminal Procedure provides:

> "If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection in camera any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial."

Counts 1 through 12 of the Indictment proport to relate to a "kickback" scheme and the issuance and mailing of twelve checks between the dates of August 27, 1981 and May 31, 1983. At the time period in question, Ralph G. Fagan and/or companies with which he was associated were doing business with Texoma Production Company. During this time period the government contends that Donald Riley was employed by Texoma Production Company. Counts 1 through 12 are almost identical except for the dates, amount of check, company on which it is drawn, and bank upon which it is issued. They have no such similarity with Counts 13 and 14.

At the date and time alleged in Counts 13 and 14, December 30, 1984, neither Ralph Fagan or any company with which he was associated in a managerial function was doing any business with Texoma Production Company. Similiary, on December 30, 1984, Donald L. Riley was not employed by Texoma Production Com-

pany. The government could not in any reasonable manner contend there to be continued existence of the scheme and/or artifice to defraud alleged in Counts 1 through 12 of the Indictment. Moreover, Fagan and/or the companies with which he was associated were in active civil litigation against Texoma Production Company. Simply stated, the critria for joinder of offenses under Rule 8 (a) was not met. Moreover, the joinder of offenses for trial together seriously prejudiced defendant, Fagan, for the reason that any jury hearing the evidence pertaining to Counts 13 and 14 would be more inclined to convict on Counts 1 through 12 than any jury whose evidence did not include that related to Counts 13 and 14. The evidence on Counts 13 and 14, insofar as it attempts to link defendant Fagan, relies almost exclusively on the testimony of Thomas Henry Woolsey who had already pleaded guilty. Testimony of such a tenuous nature with a high potential for prejudice should have been excluded from the trial in Counts 1 through 12.

Additionally, and independently, the charges with respect to Counts 13 and 14 if initiated at all should have been initiated in the United States District Court for the Western District of Louisiana, the forum in which the government's chief witness, Thomas Henry Woolsey, was prosecuted for the same conduct.

The trial judge apparently had some problem with the question of severance. See Record on Appeal, volume 3, pages 1-2 through 1-6. The Court apparently merged its consideration of the request for severance with an independent question raised by a Motion for Rule 21 (b) Transfer. Similarly, the court appeared to be guided by its strong desire to try the case promptly. See Record on Appeal, volume 3, pages 1-10, line 8, through 1-11, line 10. The Motion for Severance was reurged. See Record on Appeal, volume 3, page 1-11, beginning at line 14. The trial judge acknowledged that he was troubled by the request for severance on

Counts 13 and 14 and, accordingly, these were reurged throughout the proceedings.

2. Whether Evidence Supports a Finding if a Scheme to defraud as alleged in the Indictment and required by 18 U.S.C. 1341

The Indictment charges a great number of things in Counts 1 through 12 which, not only did the government not attempt to prove, but which on the other hand the evidence affirmatively showed to be false. For example, the Indictment alleged that part of the scheme and artifice to defraud is that Donald Riley would and did form a "dummy" corporation for the purpose of disguising payments from Ralph G. Fagan or his companies, to avoid detection by Texoma. Specifically, this "dummy" corporation was called "C & D Consultants, Inc." The testimony of the main government witness, however, Donald Riley, was that he had opened up an account under the assumed name of C & D Consultants approximately a year before he had any dealings with defendant, Ralph Fagan. Riley had opened the account on his own because he was doing business with Mr. Jordan and was planning on leaving Texoma and starting a company of his own. See Record on Appeal, volume 5, page 3-77, lines 7-9 and lines 17-22. See also Record on Appeal, volume 5, page 3-78, lines 1-3 and lines 20-25, page 3-79, lines 1-6 and lines 16-18. The decision to incorporate C & D Consultants and thereby form C & D Consultants, Inc., were made solely by government witness Donald Riley and his accountant. Fagan did not tell him to incorporate and, in fact, did not know he was doing so. See Record on Appeal, volume 5, page 3-113, lines 8-18.

Additionally, the Indictment in Count 1, paragraph 11 (which is made part of counts 2 through 12) alleged that it was part

of the scheme that the work boats were chartered for approximately three thousand, two hundred dollars per day. Not only did the government not offer a single invoice or record of payment for a work boat at the rate of three thousand, two hundred dollars per day or a crew boat for two thousand dollars per day, the evidence is to the contrary. Not only was Donald Riley unable to give testimony of any crew boat at two thousand dollars per day, but all other witnesses who testified affirmed that there were none. Specifically, co-defendant, Jeffrey Hughes, kept records and testified that there were none. Specifically, Milton Skeen, a private investigator who has about fifteen years experience in the boat business, was called by the defense. His testimony begins in the Record on Appeal, volume 6, at page 4-16. He reviewed all of the discovery material made available by Texoma Production Company in connection with its civil suits against defendant, Ralph Fagan, and the companies with which he is associated for the time period between June 1, 1981, and August of 1983. He was specifically asked to look for any invoices on work boats and crew boats. See Record on Appeal, volume 6, page 4-57. He found four invoices for state of the art type boats in the price range of three thousand, two hundred dollars, these being 185-foot class modern vintage three milion dollar cost type vessels. The majority of the invoices were for much lesser amounts per day. See testimony of Milton Skeen, Record on Appeal, volume 6, page 4-58 beginning at line 9. The four vesssels that were in the three thousand, two hundred dollar price range were for a particularly short period. See Record on Appeal, volume 6, page 4-61, lines 21-25, and page 4-62, lines 1-15.

The witness, Milton Skeen, was also asked to determine whether there were any crew boats at two thousand dollars per day. See Record on Appeal, page 4-62, lines 24 and 25, and Record on Appeal, page 4-63, lines 7-12. There were none. He did, however, find an invoice for one thousand, two hundred eighty-five

dollars.

The testimony of Milton Skeen who actually examined the invoices is consistent with the testimony of Donald Riley and Jeffrey Hughes to the effect that the allegations in the Indictment with respect to requiring payments of three thousand, two hundred dollars per day for work boats and two thousand dollars per day for crew boats is simply not true.

The more important issue, however, with respect to Counts 1 through 12 which charge mail fraud is the actual agreement or understanding reached or acquiesced in by Ralph Fagan and Donald Riley. Ralph Fagan did not testify at the trial. However, his prior statement to a deputy sheriff was entered into evidence. That statement, if believed, would disclose that Ralph Fagan is an extortion victim having been required to pay money to keep contracts he already had and he merely absorbed the loss. This would in no way defraud Texoma. If anyone would have been defrauded, it would have been defendant Fagan.

On the other hand, a different explanation was given with respect to the agreement acquiesced in between defendant Fagan and government witness Riley. At the time of the supposed agreement defendant Fagan was doing substantial business with Texoma and he was pretty regularly the low bidder. See testimony of Donald Riley, Record on Appeal, volume 5, page 3-83, lines 6-12. Some of Fagan's boats cost in excess of three million dollars and one of the guides used in the industry for rental of the boats was to divide the cost by one hundred dollars - in other words, a three million dollar boat was worth three thousand dollars a day rental. See testimony of Donald Riley, Record on Appeal, volume 5, page 3-84, lines 16-25. Fagan did not have an exclusive contract on the boats with Texoma and never had 100% of their boat business. He would generally be the lowest bidder. See testimony of Donald

Riley, Record on Appeal, volume 5, page 3-86, lines 14-22. If the market dropped, Riley would require Fagan to lower the price of his boats. See testimony of Donald Riley, Record on Appeal, volume 5, pages 3-87, lines 1-6.

At the time of the proported agreement between Fagan and Riley (according to government witness Riley) it was understood that (1) the prices would have to remain competitive, (2) Texoma would be number one, (3) Texoma would be taken care of first, and (4) Texoma gets their interest taken care of as a primary goal. The agreement, as Donald Riley testified to in the trial, is reflected in the Record on Appeal, volume 5, page 3-89, beginning at line 13 and ending at page 3-90, line 20, as follows:

"A He said, I can keep my prices competitive. I just said that, like I said while ago, number one, Texoma Production Company is who we was working for, to do their business first, and then what we do is ours.

Q Would you tell him that he still had to remain competitive?

A Yes, I did.

Q And did you say that Texoma would be number one?

A That's right.

Q You said that Texoma had to be taken care of first?

A That's right

Q And did you say to seeing that Texoma gets their interest taken care of is the primary goal?

A That's correct.

Q That's the understanding you reached with Mr. Fagan?

A Yes.

Q That Texoma --

A I'm sorry.

Q That Texoma would be first and he had to remain competitive?

A That's right. And that I would receive the hundred dollars, yes.

Q And that's somewhat consistent with what you did with respect to your transaction with Les Jordan, isn't it, sir?

A Yes.

Q In other words, you still wanted Texoma to be first, and the price to be competitive?

A That's right.

Q And you expressly told that to Mr. Fagan; is that correct?

A That's correct.

Q You said it three ways: Number one--"

It is submitted that not only are the allegations of the Indictment not supported by the evidence, but that any agreement reached required that the prices be competitive - that is that they be the lowest available-and that Texoma's interest was to be put first

and above all other things. This is the antithesis of a scheme to defraud. Factually, the evidence does not support the Indictment and legally it does not support a find of the elements required for violation of 18 U.S.C.1341.

3. Application of McNally vs. U.S.

Fagan contended that Texoma was not defrauded within the meaning of Section 1341 because he absorbed the cost of the payments of Riley himself, and because his leasing rates remained competitive. The United States Court of Appeals, Fifth Circuit, rejected this contention and stated:

> "... We have stated that section 1341 is violated when an employee violates his duty to disclose to his employer economically material information which the "employee has reason to believe . . . would lead a reasonable employer to change its business conduct." *United States v. Ballard*, 663 F.2d 534, 541 (5th Cir. 1981) *(Ballard I) as modified on reh'g,* 680 F.2d 352 (5th Cir. 1982) (*Ballard II*)."
>
> *United States vs. Fagan*, see opinion of United States Court of Appeals, Fifth Circuit, attached as Appendix A.

It is submitted that the rationale and reasoning which supported the holdings of the cases cited by the Court of Appeal in this section of its opinion has been eroded by the case of *McNally vs. United States*,_____ U.S._____, 107 S.Ct. 2875, 95 L.Ed2d_____ (1987). The instant case was tried in the District Court and briefed and argued in the Court of Appeal prior to the *McNally* decision. The authorities relied upon by the government in drafting its indictment and introducing its evidence and relied upon by the trial judge in regulating the evidence and preparing the charge to the jury and

by the Court of Appeal in its opinion are all pre-*McNally*. For example, Fagan sought by bill of particulars to learn how the alleged scheme to defraud would or did cause economic loss to Texoma Production Company. The prosecution opposed this request for information and filed a pleading entitled "Government's Motion in Limne", a copy of which is appended to this petition for writ of certiorari as Appendix D. This government motion sought to exclude any evidence as to whether or not, and under what circumstances, Texoma Production Company suffered an economic loss as a result of the alleged scheme to defraud. It demonstrates that the case was tried under the then existing Court of Appeal's inaccurate interpretation of the mail fraud statute to include matters other than economic loss.

Simply put, the rationale of *Ballard II* which is heavily relied upon by the Court of Appeal will not stand up to the *McNally vs. United States* standard.

Also with respect to that section of the Court of Appeal opinion, the nature of the agreement between Riley and Fagan is reflected in the Record on Appeal, volume 5, page 3-89, beginning at line 13 and ending at page 3-90, line 20. It is consistent with prior sworn testimony of Donald Riley given in the civil proceedings. It demonstrates there was *no intent to defraud Texoma*. The primary goal of that agreement was to take care of Texoma's interest first, make Texoma number one and be sure that the prices were competitive. This simply is not consistent with an intent to defraud, especially when measured against the standard announced by the Supreme Court of the United States in *McNally vs. United States, supra*.

4. Best Evidence Rule

As indicated elsewhere in this petition, defendant, Ralph G.

Fagan, did not testify. The government introduced, however, certain statements he had made at earlier times concerning the circumstance of the issuance of ten of the twelve checks which form the basis of Counts 1 through 12 of the Indictment relative to mail fraud. One such witness called by the prosecution was a Louisiana deputy sheriff from Lafourche Parish named Chris Boudreau. As a Lafourche Parish deputy sheriff, he had taken a tape-recorded interview from the defendant, Ralph G. Fagan, at a time when Fagan filed a complaint against Donald Riley alleging that he, Fagan, was being extorted into paying Riley to keep him from interferring with contracts which he, Fagan, and his company already had with Texoma Production Company. When the government prosecutor began to elicit the substance of defendant Fagan's tape-recorded statement from Lafourche Parish deputy sheriff Chris Boudreau, counsel for the defendant stated:

"MR. BURNES: Your Honor, at this time, the prosecution has a tape recording of that interview and they have a transcript of it. There would be nothing more accurate than that.

THE COURT: Well we're going to hear his recollection of it.

MR. SABALOS: We're going to hear this recollection and —

THE COURT: Overrule the objection."

Record on Appeal, volume 5, beginning at page 3-118, line 21, through page 3-119, line 4.

Thereafter, the witness was permitted to give his testimony in lieu of the tape-recording or its transcript.

Federal Rules of Evidence, Rule 1001 (1), defines "writings" and "recordings". Federal Rules of Evidence, Rule 1002, provides:

> "To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by act of Congress."

Thus, the "best evidence" rule is retained in the Federal Rules of Evidence by Rule 1001 and 1002 with respect to writings and recordings. Moreover, because of the existence of the recording and transcript, as well as their availability, the testimony of Deputy Sheriff Boudreau could amount to nothing more than opinion testimony prohibited under Federal Rules of Evidence, Rule 701.

Despite counsel for the defense's objection to the testimony of Deputy Sheriff Boudreau and the Court's overruling of the "best evidence" objection, the prosecutor indicated that he was not offering the transcript. See Record on Appeal, volume 5, page 3-124, line 22.

5. *Whether Ralph Fagan is responsible for the conduct of Thomas Henry Woolsey*

Count 13 of the Indictment and Count 14 of the Indictment both deal exclusively with a single telephone conversation between two government witnesses, Donald Riley and Thomas Henry Woolsey. This conversation, as charged in both counts, occurred on December 30, 1984. Although Count 13 of the Indictment, which proports to charge a violation of 18 U.S.C. 1512 (a) relative to interstate communication of a threat, the effort to involve defendant, Fagan, in these counts is through 18 U.S.C. 2.

Therefore, it is pertinent to examine the latter statute. 18 U.S.C. 2 provides:

> "(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

Thus, unless defendant Fagan aided, abeted, counseled, commanded, induced or procured the conversation between Woolsey and Riley on December 30, 1984, or unless he willfully caused the act of the conversation to be done, he is not accountable for it under 18 U.S.C. 2.

First, it is appropriate to examine the conversation which forms the basis of Counts 13 and 14 of the Indictment. The transcript of the December 30, 1984, conversation appears in the Record on Appeal, volume 5, beginning at page 3-157, line 24, through Record on Appeal, volume 5, page 3-164, line 11. This is the statement which is the basis of the charge. The first observation is that Donald Riley who was working with the F.B.I. at the time is the person who requested the fifty thousand dollars from Thomas Henry Woolsey.

There was a prior recorded telephone conversation between Donald Riley and Thomas Henry Woolsey on December 28, 1985, also at a time when Donald Riley was cooperating with the prosecution. It is found in the Record on Appeal, volume 5, page 3-166, beginning at line 15 and going through Record on Appeal, volume 5, page 3-169, line 16. There certainly is no threat in this coversation because Woolsey repeatedly says "It's all to your

benefit". "Like I said, it's to your benefit and it's going to be good news for you." Nonetheless, when Donald Riley re-establishes contact on December 30, 1984, it is he who in his charade implies that sinister things may happen to him. It is also he, Donald Riley, who suggests the figure of fifty thousand dollars. Neither of these conversations occurred in the presence of defendant, Ralph Fagan. The posture of these conversations must be understood in connection with a visit which Woolsey made to Riley's home on December 26th and a call which Woolsey made to Fagan *after* his December 30, 1984, conversation with Riley which forms the basis of Counts 13 and 14.

The testimony of Woolsey shows that he was pretty close friends with Donald Riley. See Record on Appeal, volume 5, page 3-179, lines 3-5. The relationship was on a social in addition to a business relationship. See Record on Appeal, volume 5, page 3-181, lines 9-12. Woolsey, however, had lost computer business with Texoma which Riley gave to Riley's son. See Record on Appeal, volume 5, page 3-182, lines 822. Although Woolsey states that Fagan had said it would be worth twenty thousand dollars for a no-show on Riley, Woolsey states that *prior* to December 26th, he did not feel that he was personally being asked to do anything. See Record on Appeal, volume 5, page 3-189, lines 18-22. Woolsey went to Riley's house on December 26th on a spur of the moment type thing while he was somewhat under the influence of alcoholic beverages. See Record on Appeal, volume 5, page 3-190, lines 4-8. In fact, he had a little more than usual to drink and had a slight "buzz" on. See Record on Appeal, volume 5, page 3-191, lines 22-24, and page 3-192, lines 14 and 15.

Woolsey's reasons for going to Riley's house on December 26, 1984, were his own and Woolsey testified as follows:

"Q Did you tell Mr. Powell and Mr. Yonkers your

reason for going to Riley's home on December 26?

A Yes, sir.

Q And what was that reason, sir?

A To attempt to negotiate something with Riley where he wouldn't testify.

Q And prior to December 26, had Mr. Fagan specifically asked you to go to Riley's home?

A No, sir, he had not.

Q And you told Mr. Fagan that you were going to Mr. Riley's home on December 26?

A No, sir, I did not.

Q Didn't tell him before you went at all?

A No, Sir."

See Record on Appeal, volume 5, beginning at page 3-192, line 22 through page 3-193, line 10.

. . .

Q Did Mr. Fagan ever ask you take Riley out in his yard and beat him up?

A No, sir, he did not.

Q Now, prior to your going to Mr. Riley's home on December 26, 1984, had Mr. Fagan ever asked you to offer anything to Riley with respect to his testimony?

A No, sir.

See Record on Appeal, volume 5, beginning at page 3-193, line 22 through page 3-194, line 3.

. . .

Q And did Mr. Fagan ever ask you to tell Mrs. Riley that anything tragic might happen to her husband?

A No, sir.

Q Did Mr. Fagan ever ask you to tell Mr. Riley's daughter that anything drastic might happen to her father?

A No, sir.

Q Did he ask you to tell anyone that Mr. Riley might be found in cement?

A No, sir.

See Record on Appeal, volume 5, page 3-194, lines 10-18.

. . .

Q So you went to Mr. Riley's house not at the request of Mr. Fagan, and you called Mr. Riley or you spoke to him on the phone on December 26 not at the request of Mr. Fagan, and in that coversation, first discussed with him giving him something not to testify; is that correct?

A Yes, that's correct.

Q And this was done without the request or prior knowledge of Mr. Fagan; is that correct, sir?

A That's correct.

See Record on Appeal, volume 5, page 3-195, lines 14-22.

. . .

Q Is that correct? And were you trying to assure Mr. Riley in the December 28 conversation that it would be good news and nothing was going to happen to him?

A That is correct.

Q And it was initially your idea to work things out between the parties; is that correct?

A That's correct.

Q And you felt it would benefit a great number of people, not just Riley and not just Mr. Fagan; is that correct?

A Yes, that's true.

Q And as a result of that, you felt you were doing a service to a great number of people; is that correct?

A I suppose so.

Q And that's one of the reasons you wanted to assure Mr. Riley that nothing bad would come of him on December 28?

A Yes.

Q Now, when you spoke to him on December 30, do you recall who brought up any specific figure of money first?

A Mr. Riley.

Q And what kind of money was he asking for?

A I believe it was $100,000.

Q And did he — did you agree to that amount?

A No, Sir.

Q Who brought up the figure of $75,000?

A I believe that was Mr. Riley again.

Q Did you agree to that amount?

A No, sir.

Q Who brought up the figure of $50,000?

A I believe he brought that up also.

Q Did you agree to that amount?

A No, sir.

Q Did you want to try to get that amount for him?

A I wanted to present that.

Q To help Mr. Riley and to help Mr. Fagan to help a great number of people involved in Texoma; is that correct?

A I suppose so."

See Record on Appeal, volume 5, beginning at page 3-197, line 4 through page 3-198, line 16.

Immediately after the conversation on December 30, 1984, between Riley and Woolsey which forms the basis of Counts 13 and 14 of the Indictment, Woolsey contacted Fagan. At that time, the defendant Fagan unequivocally and firmly told Woolsey to have nothing to do with Riley. Woolsey described the conversation as follows in Record on Appeal, volume 5, page 3-199, beginning at line 8 and ending at page 3-200, line 3:

"Q And is that when he told you, don't go near him under any circumstances?

A That is correct.

Q And did he also volunteer, the man may be wired?

A That is correct.

Q And told you to have nothing further to do with him?

A That is correct.

Q And that was less than two minutes after you got through talking to Riley and he had the offer by Riley to accept $50,000?

A That is correct.

Q Was Mr. Fagan unequivocal in his instruction to you to stay away from Riley?

A Yes.

Q As firm as it could be said to you?

THE COURT: Let's move along. My gosh, we're on the same question over and over and over. Let's move along.

Q Did you contact Mr. Riley further about this matter after that conversation on December 30?

A No, sir."

At no time did Riley call Fagan to see whether he would have any part of the deal. At no time did the F.B.I. attempt to have Riley tape-record any conversation with Fagan. This was simply a charade played out by two government witnesses. Under no circumstances did Fagan aid, abet, counsel, command, induce, procure, cause or acquiesce in Woolsey's actions. Title 18 U.S.C. 2 simply is not applicable.

Interestingly enough, the absence of any evidence of Riley (who was then working with the F.B.I.) contacting either Woolsey or Fagan after December 30 (to find out Fagan's response to Riley's $50,000.00 bribe request) is strong presumptive evidence that the F.B.I. and Riley knew at the time that the charade they were acting out would not be countenanced by defendant Fagan.

CONCLUSION

Pre-trial rulings denying defendant's request for severance of the mail fraud counts from the tampering with witness and interstate communication of threat counts were prejudicial to the defense in this case. A witness should not be permitted to testify as to the content of a tape-recorded statement of a non-testifying defendant. The evidence does not sustain the finding of a scheme to defraud and the United States Court of Appeals, Fifth Circuit, failed to properly apply the *McNally* case. Fagan is not accountable for Woolsey's unsolicited and unrequested conversation with Riley who at the time was acting as an F.B.I. informant. For the reasons hereinabove advanced, it is respectfully submitted that the

decisions of the United States District Court and the United States Court of Appeals, Fifth Circuit, are erroneous, and that the present petition for writ of certiorari should be granted.

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CERTIFICATE

I certify that three copies of the foregoing Petition for Writ of Certiorari have been served upon opposing counsel: Henry K. Oncken, United States Attorney, P.O. Box 61129, Houston, Texas 77208-1129; James Clifford Sabalos and James R. Gough, Assistant United States Attorneys, P.O. Box 61129, Houston, Texas 77208-1129; and upon the Solicitor General, Department of Justice, Washington, D.C. 20530, pursuant to Rule 28.5 (b), by placing the same in the United States Mail, properly addressed with sufficient postage affixed thereto.

Alexandria, Louisiana, this 8th day of October, 1987.

J. MICHAEL SMALL

APPENDIX "A"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-2284

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RALPH G. FAGAN,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF TEXAS

(June 30, 1987)

DATE OF OPINION—JUNE 30, 1987

REHEARING DENIED—AUGUST 10, 1987

Before RANDALL, GARWOOD, and DAVIS, Circuit Judges.

GARWOOD, Circuit Judge:

Defendant-appellant Ralph Fagan was convicted of aiding and abetting on nine counts of mail fraud, 18 U.S.C. § 1341, one count of witness intimidation, 18 U.S.C. § 1512 (a), and one

count of transmitting a threat in interstate commerce, 18 U.S.C. § 875 (b). The district court imposed concurrent two-year sentences on each count. We affirm.

FACTS AND PROCEEDINGS BELOW

A. The Mail Fraud

Ralph Fagan owned two Louisiana corporations — Toddell Enterprises, Inc. and Fagan Boat Service, Inc. — engaged in leasing work boats (used to transport heavy equipment to offshore drilling platforms) and crew boats (smaller boats used for ferrying crews and supplies) to offshore drilling companies. Sometime late in 1980 or early in 1981, Fagan was introduced to Donald L. Riley, who at that time was drilling superintendent of Texoma Production Company, a wholly-owned subsidiary of Mid-Continent Petroleum. As drilling superintendent Riley made the initial choice of the companies from which to lease boats for a given drilling project. The drilling superintendent sent his selection for approval to the manager of drilling; from there the recommendation went to Texoma's vice president for drilling and production, and finally the recommendation was sent to Texoma's president.

Apparently, Riley leased some boats from Fagan's companies shortly after their first meeting. Soon thereafter, Riley was promoted to manager of drilling. He hired Jeffrey Reid Hughes to fill his former job as drilling superintendent.

Sometime in the first half of 1981, Fagan and Riley — who was by then the manager of drilling — agreed to a kickback scheme. Fagan would pay Riley $100 a day for each boat that Texoma leased from Fagan's companies. Beginning in August 1981 and continuing until May 1983, Fagan or his companies paid Riley about $165,000 in twelve checks made payable to C&D

Consultants, Inc., a corporation created by Riley at least partially to hide the kickbacks from Texoma. All the checks were mailed from Larose, Louisiana, a town not too far from New Orleans, in the Eastern District of Louisiana, to Spring, Texas, a town near Houston, in the Southern District of Texas.

When the scheme had been in place just a short time, Riley told Hughes about it and urged him to set up a dummy company so he could receive part of the kickbacks Fagan was paying to Riley. Hughes agreed, and Riley split his kickbacks with Hughes on four occasions, but stopped doing so without explanation, even though Riley continued receiving kickbacks from Fagan.

Each of the twelve checks was the basis of a separate count charging Fagan, Hughes, and Riley with mail fraud. At trial the government dropped three of the counts (counts 5, 7, and 9) because on three occasions two checks were mailed together. Thus there were only nine mailings. *See United States v. Blankenship*, 746 F.2d 233, 236 (5th Cir. 1984) (each separate use of the mails is a separate crime). In exchange for Riley's testimony and cooperation at trial and his plea of guilty to four counts, the government dropped the remaining counts against him and also promised not to seek charges against Riley arising from other illegal activities in which he was involved, including at least one other kickback arrangement. Fagan was convicted on all nine mail fraud counts. The jury acquitted Hughes.

B. The Threats

Sometime after the last kickback was sent, Texoma fired Riley. He had violated company policy by leasing a computer for Texoma from his son's company. At this point, Texoma's parent, Mid-Continent, still did not know about the kickback scheme, but for several months Mid-Continent auditors had been suspicious of

the informality of the relationship between Fagan's companies and Texoma. Large sums of money were being paid by Texoma to lease Fagan's boats, yet there was little documentation that Texoma had solicited bids from other companies. Mid-Continent eventually discovered the kickback scheme and caused Texoma to file a civil action against Fagan and others. At all times material, the suit was pending in the United States District Court for the Southern District of Texas, Houston Division. In connection with this civil suit, the final important character in this appeal, Thomas Woolsey, comes on the scene.

Woolsey was a friend of Fagan's, to whom he had been introduced by Riley. At the time, Riley and Woolsey were also friends, but they later had a falling out over Riley's decision to lease a computer for Texoma from his son's company rather than from Woolsey.

In the fall of 1984 Fagan repeatedly expressed concern to Woolsey about what Riley's testimony might be in Texoma's civil suit against Fagan and others. According to Woolsey, Fagan said he could not afford to have Riley testify against him and that a no-show by Riley would be worth $20,000. Woolsey testified that he understood this to be an offer by Fagan to pay him or anyone else to obtain Riley's silence by any means, including murder.

On December 26, 1984, Woolsey, slightly inebriated, went to Riley's home near Houston. Woolsey testified he intended to beat Riley up if he would not agree not to testify about the kickback scheme. Riley was not home, but Woolsey stayed for some time, frightening Riley's wife and daughter with his behavior and threats of violence to Riley. While there Woolsey also spoke to Riley on the telephone, threatening and attempting to bribe Riley not to testify in the suit. Nothing was resolved except that the two agreed to discuss the matter later. After talking to Riley, Woolsey, the

same day, called Fagan from the Riley house and later from a pay phone. Woolsey testified that both times he told Fagan that he thought that bribery, as opposed to other means, would suffice to cause Riley not to testify.

Woolsey's December 26 threats frightened Riley, and he sought protection for himself and his family from the FBI. The FBI instructed him to record his subsequent telephone conversations with Woolsey, and Riley complied. On December 28 and again on December 30, Woolsey, then in the Southern District of Texas, called Riley, then in the Western District of Louisiana. The transcripts of Rileys' recordings of those conversations were introduced as evidence.

Although in neither of the latter two conversations does Woolsey explicitly threaten to kill Riley, in both conversations the threat of violence is clearly implicit, particularly in light of the events of December 26. The conclusion of the December 30 conversation was that Riley would accept $50,000 not to testify.

Immediately after his December 30 conversation with Riley, Woolsey called Fagan, who told him to have no further contact with Riley because Fagan suspected that Riley was cooperating with the government. Fagan was arrested a few weeks later. He was indicted in December 1985 and tried in February 1986. The jury found him guilty of the nine counts of mail fraud (counts 1, 2, 3, 4, 6, 8, 10, 11, and 12; 18 U.S.C. § § 1341, 2). It also found him guilty of inducing and procuring (18 U.S.C. § 2) Woolsey to transmit a threat in interstate commerce (count 14; 18 U.S.C. § 875 (b)) and to intimidate a witness (count 13; 18 U.S.C. § 1512 (a)), each in respect to Woolsey's December 30 telephone call to Riley. The district court convicted Fagan on all eleven counts and sentenced him thereon to eleven concurrent two-year prison terms and imposed a $50 special assessment on both threat-related counts.

DISCUSSION

On this appeal, Fagan raises several challenges to his convictions.

I. Refusal to Sever

Fagan's first contention is that the district court erred in refusing to sever the mail fraud counts from the interstate threat and witness intimidation counts. The relevant rules of procedure governing this issue are Fed. R. Crim. P. 8(a) and 14.

A. *Rule 8 (a)*

Rule 8(a) allows the joinder of offenses against a single defendant "if the offenses . . . (1) are of the same or similar characater or (2) are based on the same act or transaction or (3) on two or more acts or transactions connected together or constituting parts of a common scheme or plan." We review *de novo* the district court's denial of a Rule 8(a) motion. *United States v. Davis*, 752 F.2d 963, 971 (5th Cir. 1985); *United States v. Forrest*, 623 F.2d 1107, 1114 (5th Cir.); *cert. denied*, 101 S.Ct. 327 (1980); *cf. United States v. Lane*, 106 S.Ct. 725, 732 n.12 (1986) (joinder of defendants under 8(*b*) is reviewed on appeal for an "error of law").

In rejecting Fagan's motion to sever, the district court did not violate Rule 8(a). Joinder was clearly appropriate under the third clause of Rule 8: "two or more acts . . . connected together or constituting parts of a common scheme or plan." Fagan argues that the mail fraud counts involve a different scheme than the witness intimidation counts. We disagree. The threat and intimidation were related to the fraudulent scheme. From Fagan's point of view, the scheme could not be considered a success if it or his part

in it were to be established on the public record or if he were to be held civilly liable for it. Fagan's participation in intimidating Riley was an integral part of his continuing effort to ensure nondisclosure and retain the benefits of his fraud.

On similar facts we reached the same conclusion in *United States v. Davis*, 752 F.2d 963 (5th Cir. 1985). The defendant was indicted for mail fraud and for making false statements to a federally insured bank. He was also charged with obstructing justice because, *inter alia*, he directed a witness in the mail fraud case to testify a certain way. Like Fagan, the *Davis* defendant argued that "the two obstruction of justice charges and the mail fraud and false statement charges grew out of a separate set of circumstances." 752 F.2d at 972. We held to the contrary. "Both obstruction charges grew out of Davis' attempt to avoid implication in or the detection of a fraudulent scheme. Thus, the coverup attempts bear a logical relationship to the underlying fraud crimes." *Id.*; *see also United States v. Scott*, 659 F.2d 585, 589 (5th Cir. 1981), *cert. denied*, 103 S.Ct. 121 (1982); *United States v. Duzac*, 622 F.2d 911 (5th Cir.), *cert. denied*, 101 S.Ct. 570 (1980).

B. *Rule 14*

Fagan also argues that joinder of the claims *prejudiced* him because he wanted to testify on his behalf with regard to the threat-related counts, but not the mail fraud counts. This argument is cognizable under Rule 14, which allows the district court to sever offenses properly joined under Rule 8 upon a showing of prejudice. We review the disposition of Rule 14 motions for an abuse of discretion. *E.G.*, *Lane*, 106 S.Ct. at 723 n. 12; *Davis*, 752 F. 2d at 974.

The district court did not abuse its discretion in denying

Fagan's Rule 14 motion. Fagan did not inform the district court until after the jury's verdict that he wanted the counts severed so that he could testify with regard to some but not others. This is simply too late. There is no valid reason Fagan could not have properly brought this contention to the district court's attention before trial began. Fagan's tardy post-verdict assertion did not meet his burden of demonstrating that he had "important testimony to give concerning one count and a strong need to refrain from testifying on the other." *Forrest*, 623 F.2d at 1115 (quoting *Alvarez v. Wainwright*, 607 F.2d 683, 686 (5th Cir. 1979)). Until the trial was over, the only reason Fagan gave for a Rule 14 severance was that the jury would think worse of him if all counts were tried together and therefore would be more prone to convict him. As we pointed out in *Forrest*, this possibility exists anytime a defendant is tried on more than one count; standing alone it is not grounds for a new trial. 623 F.2d at 1115. Fagan was not otherwise prejudiced by the joinder of all counts because evidence of the mail fraud scheme would have been admissible in a separate trial for witness tampering to show Fagan's motive. Evidence of the witness tampering would have been admissible in a separate mail fraud trial to show Fagan's guilty knowledge. *See Davis*, 752 F.2d at 972; *Scott*, 659 F.2d at 589.

II. Refusal to Transfer the Case

In the district court, Fagan filed an unsuccessful Fed. R. Crim. P. 21(b) motion (permitting transfer for convenience and in the interest of justice), to transfer all counts against him from the Southern District of Texas, Houston Division, to the Eastern District of Louisiana, where he lived. On appeal Fagan asserts that the district court committed reversible error in denying the motion. To prevail, Fagan must show that in denying the transfer the trial judge abused his "broad discretion." *United States v. Dickie*, 775 F.2d 607, 609 (5th Cir. 1985). *See also United States v. Juarez*,

573 F.2d 267, 280 (5th Cir.), *cert. denied*, 99 S.Ct. 289 (1978). After surveying the Rule 21 appellate cases, Professor Wright reports, "In no case has a final judgment been reversed on this ground." 2 C. Wright, *Federal Practice & Procedure (Criminal)* § 347, at 282 (1982 and Supp. 1986).

Fagan asserts that holding trial in Houston, rather than Louisiana, made it more disruptive to him, his witnesses, and his attorney. He also asserts that if he had been tried in Louisiana, one particular attorney, who did not represent him in this trial, would have participated in his defense. However, the incovenience Fagan asserts does not show the prejudice necessary to establish abuse of discretion. In *United States v. Alvarado*, 647 F.2d 537 (5th Cir. 1981), a case involving the transfer of a case from Brownsville to Victoria, this Court held that the "additional travel and lodging expenses upon (defendants) and their attorneys in addition to the expenses that became necessary in order to subpoena crucial witnesses" did not demonstrate sufficient prejudice to establish an abuse of discretion. 647 F.2d at 539. The distance in this case is somewhat greater, but Fagan has not shown that the fact he was tried in Houston kept him from calling any witness, prevented his access to any evidence, or in any other way prejudiced the outcome of his case. Fagan does not dispute that venue was proper in the Southern District of Texas. He had mailed the kickback checks to a town in that district and it was from that district that Woolsey had made the threatening phone call. *See* Fed. R. Crim. P. 18; 18 U.S.C. § 3237 (a). Further, the threats related to the civil suit against Fagan for his part in the kickback scheme and that suit was pending in Houston. Moreover, as Riley was in the Western District of Louisiana when the threatening call was made to him, and as the charged mailings were all made from the Eastern District of Louisiana, the Southern District of Texas was the *only* district in which (at least absent further evidence) venue was initially proper as to all counts. While this does not prevent a Rule

21(b) transfer of all counts to another district, it is at least an indication that the government's selection of the forum was not arbitrary.

We conclude that the district court did not abuse its discretion in denying Fagan's Rule 21(b) motion.

III. "Scheme to Defraud"

"To establish a mail fraud violation, the government must prove (1) the existence of a scheme to defraud that (2) involved use of the mails for the purpose of executing the scheme. The evidence must demonstrate (3) the defendant's specific intent to commit fraud." *United States v. Goss*, 650 F.2d 1336, 1341 (5th Cir. 1981) (citations omitted). Viewed in the light most favorable to the government, *Glasser v. United States*, 62 S.Ct. 457 (1942); *United States v. Blankenship*, 746 F.2d 233, 241 (5th Cir. 1984), the evidence is sufficient to sustain Fagan's mail fraud convictions.

As for the "scheme to defraud," unrebutted testimony from several witnesses, including Riley, established the existence of the kickback scheme.[1] Fagan asserts, however, that the evidence is

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1. In the course of establishing the existence of the kickback scheme, the government called Chris Boudreau, a Lafourche Parish deputy sheriff, to testify regarding his investigation of a criminal extortion complaint that Fagan had filed in Louisiana state court against Riley, apparently not long after the scheme ended. As part of his investigation, Boudreau taped an interview in which Fagan described his arrangement with Riley. (With regard to this state charge, Riley pleaded guilty to a reduced charge of commercial bribery and was fined.)

At Fagan's trial, the district court allowed Boudreau to describe this conversation over the objections of Fagan's counsel, who asserted that the testimony

insufficient to show that this scheme was one to defraud. He claims in this connection that Texoma was not defrauded within the meaning of section 1341 because he absorbed the costs of the kick-backs himself, and his leasing rates remained competitive.[2]

We reject this contention. We have stated that section 1341 is violated when an employee violates his duty to disclose to his

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violated the "best evidence" rule – Fed. R. Evid. 1002 – because the tape of the conversation was available. On appeal, Fagan again asserts that the district court violated the "best evidence" rule. This argument is completely without merit.

The Advisory Committee notes following Rule 1002 state, "Application of the rule requires a resolution of the question whether contents are sought to be proved. Thus an event may be proved by nondocumentary evidence, even though a written record of it was made." The prosecution was not trying to show the contents of the *tape,* but rather the contents of the *conversation,* and, therefore, as the Advisory Committee note suggests, the best evidence rule was inapplicable. *See United States v. Rusmisel,* 716 F. 2d 301, 314 n.16 (5th Cir. 1983); *R&R Associates, Inc. vs. Visual Scene, Inc.,* 726 F. 2d 36, 38 (1st Cir. 1984) ("rule 1002 applies not when a piece of evidence sought to be introduced has been somewhere recorded in writing but when it is that written record itself that the party seeks to prove."); E. Cleary, *McCormick on Evidence* § 233, at 708 (3d ed. 1984) (stating that "many facts may be proved without resort to writings which record them"). The recording was, of course, available to Fagan, and he was not prevented from utilizing it.

[2] Fagan never made a motion for judgment of acquittal (nor did any of his post-trial motions raise any question as to the sufficiency of the evidence respecting any of the mail fraud counts). Accordingly, the sufficiency of the evidence on those counts is reviewed solely for manifest miscarriage of justice. *United States v. Freeze,* 707 F. 2d 132, 135 (5th Cir. 1983).

We also note that no complaints of the charge are asserted on this appeal. Indeed, the charge is not included in the record (the government advises that the charges has not been transcribed because appellant did not so request in rodering the record on appeal, and appellant has not disputed this or requested supplementation of the record).

employer economically material information which the "employee has reason to believe . . . would lead a reasonable employer to change its business conduct." *United States v. Ballard*, 663 F.2d 534, 541 (5th Cir. 1981) (*Ballard I*), *as modified on reh'g*, 680 F.2d 352 (5th Cir. 1982) (*Ballard II*).[3]

We held in *Ballard I* that the intricate kickback scheme in that case was not a "scheme to defraud" because the "defrauded" employers, whose prices were strictly regulated by federal law, could not have charged any higher price, even had they known that their employees were accepting kickbacks to sell to certain customers. There was, therefore, no potential economic detriment to the employers — and *Ballard I* expressly held that in the absence of some detriment, a breach of fiduciary duty does not constitute a mail fraud violation. *Ballard I*, 663 F.2d at 540. However, *Ballard II* observed, "(I)n an unregulated market, the detriment necessary for a finding of mail fraud . . . would be shown by mere receipt of kickbacks." 680 F.2d at 354 n.5.

This case, involving the unregulated boat leasing market, falls within the dictum of *Ballard II*. The kickback scheme deprived Texoma of economically material information regarding the amount Fagan would have accepted for his boats. Quite simply, if Riley had not violated his duty to disclose, Texoma might have captured for itself the large sums that Riley was secreting because Texoma would have known that Fagan was willing to lease his

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[3] As manager of drilling, Riley was based in Texoma's Houston office, and he lived in Texas. We note that under Texas law Riley owed Texoma an obligation "to do no act which ha(d) a tendency to injure the employer's business or financial interest." *Advance Rolls Electronics Corp. v. Green*, 624 S.W.2d 316, 318 (Tex. App. 1981–Tyler, writ ref'd n.r.e.), *cert. denied*, 102 S.Ct. 3488 (1982); *see Turner v. Byers*, 562 S.W.2d 507, 510 (Tex. Civ. App. 1978–El Paso, writ ref'd n.r.e.).

boats for less. This possibility clearly had some economic value.

A leading case in support of this conclusion is *United States v. George*, 477 F.2d 508 (7th Cir.), *cert. denied*, 94 S.Ct. 49, 155, 158 (1973). In *George*, a cabinet buyer for Zenith Radio Corporation received kickbacks from a supplier of cabinets. The defendants — the buyer, supplier, and a third party who assisted in the scheme — argued that Zenith was not defrauded because the supplier's prices were reasonable, the quality was good, and the supplier apparently absorbed the kickbacks without passing them on to Zenith. *Id.* at 512. The Seventh Circuit rejected this reasoning. "Not only did (the Zenith employee) secretly earn a profit from his agency, but also he deprived Zenith of material knowledge that (the supplier) would accept less profit." *Id.* at 513. Fagan was willing to lease his boats to Texoma at a lesser rental — the amount of the actual rental less the kickbacks. Riley plainly breached his duty to Texoma by secretly receiving and retaining the kickbacks. *See* note 3, *supra*. In these circumstances, Texoma was entitled to those funds. *See* 53 Am. Jur. 2d *Master & Servant* § 01 at 173.[4] *See also United States v. Drumm*, 329 F.2d 109 (1st Cir. 1964). The scheme was calculated to deprive Texoma of this economic benefit.[5] Moreover, as *George* observed, " 'A man is none the less

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[4] "The employee or agent may be required to account for any secret profit, gift, gratuity, or benefit which he may have received in the course of the performance of his service. An employee is bound to the exercise of good faith toward his employer and cannot, without the latter's consent, retain profits or earnings received in the course of performances of the employer's business, or in an undertaking which constitutes a breach of duty to the employer or which conflicts with his duties to his employer." *Id.* (footnotes omitted).

[5] As observed in *George*, this is unlike certain other more attenuated and indirect conflict of interest situations. 477 F. 2d at 512 n.5. It is also unlike the

cheated out of his property, when he is induced to part with it by fraud, because he gets a quid pro quo of equal value.' " 477 F.2d at 513 (quoting *United States v. Rowe*, 56 F.2d 747, 749 (2d Cir.), *cert. denied*, 52 S.Ct. 579 (1932)). Here, Texoma was fraudulently induced to part with its rental payments on the false premise (implicitly represented to it by Riley's nondisclosure when he had a fiduciary duty to disclose) that Riley, its employee making the rental decisions, was not receiving a portion of the rental payments from the lessor, Fagan, and that the latter was not accepting less than the stated rent.

Other out-of-circuit decisions in cases no stronger from the prosecution's point of view than the present also support the government's position here. Without necessarily endorsing all the language in each of the cited opinions, we call attention to them because they dispel the notion that this kickback scheme contemplated no sufficient detriment to Texoma. *See, e.g., United States v. Connor*, 752 F.2d 566, 573 (11th Cir.) (employee defrauded his employer by accepting kickback in connection with employer's land purchase even if the purchase price was "within the range of prices encompassed within the fair market value of the land" because without the employee's disloyalty the employer might have obtained a better deal), *cert. denied*, 106 S.Ct. 72 (1985); *United States v. Bush*, 522 F.2d 641, 648 (7th Cir. 1975) (city official who used his position to influence Chicago's award of advertising contract at O'Hare Airport violated section 1341 by failing to disclose his ownership interest in the successful bidder, even though contract was profitable to the city because, *inter alia*, "if the city had known of (defendant's) interest it might have been able to obtain a better contract"), *cert. denied*, 96 S.Ct. 1484 (1976); *United States v. Barrett*, 505 F.2d 1091, 1103-05 (7th

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situation where the public policy of a price control or similar statute may have precluded any possible such benefit to the employer, as in *Ballard*.

Cir. 1974, *cert. denied*, 95 S. Ct. 1951 (1975). These decisions dispel the notion that the instant kickback scheme contemplated no sufficient economic detriment to Texoma.[6]

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[6] This opinion was prepared prior to the Supreme Court's June 24, 1987 decision in *McNally v. United States*, (No. 86-286)_____ S.Ct._____ (1987). *McNally* involved an insurance broker serving the State of Kentucky who secretly funneled portions of the commissions, which the underwriters paid the broker, to state employees who saw to it that the broker continued to serve the state. However, we believe it clear that *McNally* does not change the result here. In *McNally* the Court rejected the theory "that the mail fraud statute proscribes schemes to defraud citizens of their intangible rights to honest and impartial government" and instead "read section 1341 as limited in scope to the protection of property rights." *McNally* also noted, with apparent approval, that in *Durland v. United States*, 161 U.S. 306 (1896), the Court had held that "any scheme or artifice to defraud," as used in the predecessor to section 1341, "is to be interpreted *broadly insofar as property rights are concerned*" (emphasis added). Moreover, in *McNally* the defect was in the charge, and the Court did not address the sufficiency of the evidence. It stated that

> "the jury was not required to find that the Commonwealth itself was defrauded of any money or property. It was not charged that in the absence of the alleged scheme the Commonwealth would have paid a lower premium or secured better insurance . . . . Nor was the jury charged that to convict it must find that the Commonwealth was deprived of control over how its money was spent."

Here, as we have observed, *see* note 2, *supra*, the charge is not before us, and no complaints have been made as to it. We also note that Justice Stevens, in his dissenting opinion in *McNally*, stated (and the majority opinion did not disagree):

> "Additionally, 'if an agent receives anything as a result of his violation of a duty of loyalty to the principal, he is subject to a liability to deliver it, its value, or its proceeds, to the principal.' Restatement (Second) on Agency, section 408 (1958). This duty may fulfill the Court's 'money or property' requirement in most kickback schemes."

In addition to our conclusion that the evidence amply established the existence of a "scheme to defraud," we hold that the evidence shows the requisite intent. The kickback scheme was not a creature of accident; Riley and Fagan carefully conceived and orchestrated it. The steps taken to hide the scheme show that the pair knew they were doing wrong. Contrary to Fagan's intimations to appeal, their asserted agreement that Fagan's leasing rates would remain competitive does not negate the intent to defraud. Even if Fagan and Riley were sincere, each knew that Fagan was willing to lease to Texoma for the lesser sums and that Texoma could have been receiving the benefit of Fagan's kickbacks to its employee Riley. But this was all knowingly hidden from Texoma, and in this breach of duty Fagan was Riley's equal partner. *See George,* 477 F.2d at 513-14 (intent to defraud found in receipt of kickbacks).

Finally, as for the "use of the mails" element, unrebutted testimony established use of the mails to transfer the kickback checks from Fagan to Riley, and Fagan does not claim an insufficiency of evidence on this element.

IV. The Interstate Threat and Witness Intimidation Charges

Counts 13 and 14 of the indictment charged Fagan, under 18 U.S.C. § 2, with inducing and procuring Woolsey's threats to Riley in the December 30, 1984, telephone call, contrary to 18 U.S.C § § 1512(a) and 875(b). Fagan's sole complaint on appeal

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We believe that there is sufficient evidence that the scheme here was one to deprive Texoma of its property rights, *viz.*: its control over its money, as it parted with its rental payments on the basis of a false premise; the economic value of possibly being able to rent the boats from Fagan for less, had it known he was willing to accept less; its right to the kickbacks its employee Riley received from Fagan.

as to these counts is that "(t)he evidence does not support a finding that defendant, Fagan, was accountable for the conduct of government witness Thomas Henry Woolsey . . . at the time of the telephone conversation of December 30, 1984, which gave rise to the charges in Counts 13 and 14 . . . ." In other words, Fagan's only contention as to either count 13 or count 14 is that the evidence does not show that he induced and procured the threats made by Woolsey to Riley in the December 30, 1984, telephone coversation.[7] Fagan does not, among other things, assert that *Woolsey*, in his December 30, 1984, call to Riley, did not violate 18 U.S.C. § § 875(b) and 1512(a).

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[7] As previously observed, *see* note 2, *supra*, Fagan made no motion for judgment of acquittal. On the fifth day following the verdict he did move for an extension of time "within which to file post trial motions including but not limited to a Motion for New Trial and a Motion In Arrest of Judgment pursuant to Rule 33 and Rule 34. . . ." The next day, March 6, 1986, the district court entered an order allowing Fagan "through March 14, 1986, within which to file a motion for new trial and/or a motion in arrest of judgment pursuant to Rules of Criminal Procedure, Rule 33 and Rule 34." On March 14, 1986, Fagan filed a document captioned "Motion For New Trial" stating that he "moves pursuant to Rule 33 . . . that the Court grant him a new trial." This motion does not in any way relate to the sufficiency of the evidence (or of the indictment). The same day Fagan's counsel also filed a document entitled "Motion In Arrest of Judgment" stating that he "moves that the judgment of conviction with respect to Counts 13 and 14 of the Indictment be arrested pursuant to Rule 34 of the Federal Rules of Criminal Procedure for the following, among other, reasons." The first reason given is that "Counts 13 and 14 . . . are duplication of charges" since each involves "the precise same alleged conduct," and so the verdict on both, or at least on one of the two, "should be arrested" (this complaint is not raised on appeal). The next reason (stated in paragraph 3) is:

> "No evidence was introduced to show that defendant Fagan requested Thomas Henry Woolsey to make a telephonic communication with Donald Riley. No evidence was introduced to show that defendant Fagan requested Woolsey to transmit the communication in

We reject Fagan's contention. Fagan is not guilty as an aider and abettor unless he " 'willfully associated himself in some way with the criminal venture and willfully participated in it as he would in something he wished to bring about.' " *United States v. Fischel*, 686 F.2d 1082, 1087 (5th Cir. 1982) (quoting Fifth Circuit precedent). An aider and abettor is punishable for criminal acts that are the "natural and probable consequence of the crime that he advised or commanded. . . ." *Russell v. United States*, 222 F.2d 197, 199 (5th Cir. 1955). *See also United States v. Barnett*, 667 F.2d 835, 841 (9th Cir. 1982) (delay between counsel to commit crime and principal's act does not necessarily absolve aider and abettor). Measured by these principles, the evidence linking Fagan to Woolsey is such that a rational fact finder could find him guilty beyond a reasonable doubt.

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interstate commerce. No evidence was introduced to show that defendant Fagan requested Woolsey to transmit to Riley a communication containing a threat to injure."

The motion next incorporates the grounds in the Motion for New Trial, and concludes by requesting that "this Motion In Arrest of Judgment be granted." Both motions were subsequently denied without any statement of reasons.

We do not consider that the above-quoted paragraph 3 (or any other part) of the Motion In Arrest of Judgment can qualify as a post-verdict motion for judgment of acquittal under Rule 29(c). In the first place, it does not purport to be such, but rather to be under Rule 34. In the second place, it was filed more than seven days after the verdict and was hence untimely. *See United States v. Johnson*, 487 F.2d 1318, 1321 (5th Cir.), *cert. denied*, 95 S.Ct. 41 (1974). The March 6 extension order applied only to a motion for new trial under Rule 33 and a motion in arrest of judgment under Rule 34. A motion under Rule 34 does not reach the sufficiency of the evidence. Wright, *Federal Practice and Procedure: Criminal 2d* § 571 at 373.

Hence we review Fagan's claim on appeal that the evidence is insufficient to show that he induced or procured Woolsey's December 30 threats under the manifest miscarriage of justice standard. *See* note 2, *supra*.

According to Woolsey's testimony, in the fall of 1984 Fagan repeatedly expressed concern about what Riley might say in his testimony in Texoma's civil lawsuit against Fagan and others. In Woolsey's words, "He (Fagan) stated that he couldn't have Riley testify and that he was willing to pay $20,000 for a no show." Fagan repeated this statement on many occasions, including in December 1984. Woolsey further testified:

> "Q. Did he offer you or anyone else any money to pursue that opportunity?
>
> "A. It was my understanding that it was more or less an open offer.
>
> "Q. Open offer for what?
>
> "A. For Don Riley not being able to testify.
>
> "Q. Did you understand that to mean a bribe or a murder? Or any other thing?
>
> "A. I understood it to mean that it would be whatever it took for him not to testify, and that it would not necessarily rule out him being not there permanently.
>
> "Q. In other words murdered?
>
> "A. Yes, sir.
>
> "Q. Did you in November or December—about how many times did you talk with Mr. Fagan, and where did you talk to him about these conversations of no shows?
>
> "A. There were numerous conversations. Most of them by telephone. Normally I would speak to him at his home. Also at his business occasionally."

Woolsey explained that by "an open offer" he meant that he did not understand Fagan to be asking that Woolsey personally procure Riley's absence, but that "if I could secure someone" to do so "that would be fine," and that Fagan was making "requests" to him, Woolsey, "to assist in that."

Following these conversations with Fagan, Woolsey went to Riley's home in the evening of December 26, 1984. He testified that in making this visit, and a telephone call he made from the Riley home to Riley in Breaux Bridge, Louisiana, the same evening:

> "A. I was trying to get a solution to the matter that would be less drastic than one that might occur if he didn't listen to me.
>
> "Q. Which would have been what?
>
> "A. I think the man would have been killed."

Riley testified that he received a call the evening of December 26 from his wife, who was crying, and that she put Woolsey on the phone. Riley further stated that Woolsey then told him:

> "I'm here to do you a favor. And said, you better play along with us. Said *there's a contract out to kill you*, and to keep you from your deposition being used against Mr. Fagan. And I can either get that contract to work - I can make the money by killing you, or we can give you a certain amount of money to leave the country and never hear from you again. And said, I'll be back in touch with you." (Emphasis added).

Woolsey testified that after he called Riley on the 26th, he called Fagan from the Riley home and told Fagan:

"A. That I thought we could probably get Mr. Riley to agree not to testify by the offer of money.

"Q. As opposed to anything else?

"A. As opposed to anything, yes.

"Q. As opposed to what?

"A. As opposed to more drastic means."

Riley's daughter, who was in the Riley home on the 26th, heard Woolsey speak to her mother, and then on the phone to her father, and then on the phone to another man — whom Woolsey's testimony shows to have been Fagan. As to this latter call, Riley's daughter testified that Woolsey "asked the man on the phone if he would cancel the deal if he can make Don Riley cooperate with him." Riley's daughter feared for her father's life, as well as her mother's and her own.

Later in the evening of the 26th, after he left the Riley home, Woolsey again called Fagan on the subject of Riley's not testifying. He also called Fagan on the same subject on December 28th. On both occasions, he told Fagan he thought Riley would accept money not to testify, and he testified that Fagan "was in agreement with payment" as a means of getting Riley not to testify. After talking to Fagan on December 28, Woolsey called Riley. Woolsey testified as to this connection with Riley:

"Q. Let me rephrase it. When you said, it's going to be good news, on the 28th, was that because you had talked to Mr. Fagan?

"A. Yes, sir. That's correct.

"Q. And did Mr. Fagan lead you to believe something?

"A. Yes.

"Q. And what did he lead you to believe?

"A. That the payment of monies would be agreeable."

However, the testimony reflects that Woolsey and Riley had not, through the 28th, agreed on a sum. Riley was asking for considerably more than $20,000, and the only figure Fagan had authorized for a "no show" was $20,000. Woolsey called Riley again on December 30. The pertinent parts of that conversation are as follows:

"Woolsey Don, the man cannot afford to have you testify . . . .

"Riley Well, what's he gonna offer me?

"Woolsey Ah, there are *two options*. What do you need?

(At this point, Riley hemmed and hawed over how much money he would have to be paid to keep silent. When Riley would not produce a firm number, Woolsey brought up the second option.)

"Woolsey The *second alternative*, it's not hard to come up with.

"Riley Yeah, what's that?

"Woolsey That *you don't testify at all*.

"Riley How come?

"Woolsey Like I said, it's not hard to come up with.

(Riley immediately became more cooperative, and the pair began negotiating the size of the bribe. Before reaching a final number, Riley and Woolsey had the following exchange.)

"Riley Okay. Well . . . I guess whatever it takes, Tom. I sure don't want (my) family hurt and I don't want to get knocked off.

"Woolsey Good thinking, now tell me what it takes.

(Finally Riley agreed to a bribe of $50,000. Before closing the conversation, Woolsey resorted to further thinly-veiled threats as if to seal the deal.)

"Woolsey . . . *I didn't have to go by your home the other evening*. Okay?

"Riley Well, you did.

"Woolsey Yes, but *I could have left a contract* and it would have been cheaper. And as you well know, I don't have any reason to think kind of you . . . ." (Emphasis added).[8]

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[8] The December 30 conversation focused more expressly on bribery, but also plainly threatened violence. Clearly on December 30, as also on December 26, Woolsey was telling Riley that he had one of two choices: either (1) accept $20,000 and possibly death. Riley testified in substance that this was how he understood the December 30, as well as the December 26, conversation. The jury could reasonably find that in the December 30 conversation Woolsey threatened Riley with violence if he did not agree not to testify. *See United States v. Capo*, 791 F.2d 1054, 1060, 1069-70 (2d. Cir. 1986) (for purposes of section 1512(a), defendant's gratuitous statement to prospective witness that defendant was *not* in the "mob's and that the brother of an organized crime figure had said that all would be well if everyone stayed silent was enough evidence to support conviction).

The jury could reasonably determine that Fagan had made known to Woolsey his willingness to pay $20,000 to anyone who would cause Riley not to testify, whether by violence or threats of violence or bribery, that Fagan had solicited Woolsey's assistance in effectuating this "open offer," and that he was in contact with Woolsey as Woolsey began his course of threats of violence against Riley commencing on December 26 and continuing on December 28 and 30. That Fagan told Woolsey on December 30, after Woolsey reported on his conversation that date with Riley, not to further contact Riley because "he was probably wired," in no way compels a contrary conclusion. Indeed, it merely suggests a belated change of mind. The jury could properly infer that Fagan induced and procured Woolsey's December 30 threats of violence to Riley to prevent the latter from testifying.

Accordingly, we reject Fagan's sole attack on his conviction under counts 13 and 14. We further observe that an adequate jurisdictional basis for sections 1512(a) and 875(b) is shown, inasmuch as Woolsey's threats were made in the December 30 interstate telephone call, which Woolsey placed from Texas to Riley in Louisiana, and the proceeding from which Riley was

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In this connection, we recognize that witness bribery by itself does not violate section 1512(a). *See United States v. King*, 762 F.2d 232, 238 (2d Cir. 1985), *cert. denied*, 106 S.Ct. 1203 (1986); *United States v. Lester*, 749 F.2d 1288, 1295 (9th Cir. 1984); *United States v. Risken*, 788 F.2d 1361, 1368 (8th Cir.). ("§ 1512 prohibits only specific types of conduct — intimidation, physical force, threats or attempts to do so, misleading conduct, or harassment"), *cert. denied*, 107 S.Ct. 329 (1986); *United States v. Dawlett*, 787 F.2d 771, 775 (1st Cir. 1986) ("(s)ection 1512(a) reaches only certain specifically enumerated types of witness tampering; other types of conduct, no matter how morally reprehensible, are not prohibited by the statute"); *United States v. Wesley*, 748 F.2d 962, 964 (5th Cir. 1984) ("§ 1512 . . . focuses solely on the protection of witnesses . . . from intimidation"), *cert. denied*, 105 S.Ct. 2664 (1985). Likewise, section 875(b) apparently would not reach simple bribery. *See United States v. Blount*, 229 F.2d 669, 671 (2nd. Cir. 1956).

threatened to withhold his testimony was a lawsuit then pending in the United States District Court.[9]

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[9] Woolsey's guilt as a principal (which is a necessary predicate to Fagan's guilt under 18 U.S.C § 2) was thus established as to section 1512(a) (count 13). This is also true with respect to section 875(b) (count 14), subject only to the single possible question of whether there was sufficient evidence that Riley's freedom to testify in the civil suit was a "thing of value" to him. *See United States v. Heller,* 579 F.2d 990, 997 (6th Cir. 1978) (indicating that under section 875(b) threat must be to make victim give up something of value). Here Riley was also a party to the suit, and it is not inconceivable that his testifying therein would be of value (or economic value) to him (as well as Texoma and the public), just as his not testifying was of value to Fagan. *See United States v. Zouras,* 497 F.2d 1121 (7th Cir. 1974) (in section 875(b) prosecution, testimony of victim of threat to prevent her testimony "indicates that she valued the right to testify"). *See generally United States v. Sheker,* 618 F.2d 607, 609 (2d Cir. 1980) ("thing of value" under 18 U.S.C. § 912); *United States v. Jeter,* 775 F.2d 670, 680-682 (6th Cir. 1985) ("thing of value" under 18 U.S.C. § 641; "'thieves' market" concept), cert. denied, 106 S.Ct. 1796 (1986). However, we do not resolve this matter, and decline to search the record for evidence in this respect, for Fagan (who is represented by counsel) has raised on appeal no complaint whatever as to this aspect of the case (nor did he below). We do not search the record for unassigned error, and contentions not raised on appeal are deemed waived. *United States v. Johnson,* 718 F.2d 1317, 1325 n.23 (5th Cir. 1983) (en banc). *See also McGee v. Estelle,* 722 F.2d 1206, 1213 (5th Cir. 1984) (en banc); *Olgin v. Darnell,* 664 F.2d 107, 108 n.1 (5th Cir. 1981). An exception will be made where necessary to prevent a manifest miscarriage of justice. None such is possible here. No fine was imposed on the section 875(b) count (count 14), and the confinement thereon was for the same two-year period, and was concurrent with that imposed on the other ten counts, including section 1512(a) count (count 13) which involved the identical conduct. We recognize that the $50 special assessment (under 18 U.S.C. § 3013) on Count 14 prevents the sentence on that count from being concurrent for purposes of the concurrent sentence doctrine, so that we are obliged to review all assigned errors as to that count (as we have done) notwithstanding that its sentence is *otherwise* concurrent as respects other counts. *Roy v. United States,* 55 U.S.L.W. 4662 (May 18, 1987). But the bare possibility that this $50 assessment was improperly imposed does not raise the spectre of manifest miscarriage of justice so as to dispense with the rule that only assigned errors are considered on

CONCLUSION

Having considered and rejected all of Fagan's claims of error, [10] and discerning no possibility of manifest of miscarriage of justice in his convictions, the judgment below is accordingly

AFFIRMED.

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appeal. We further note in this connection that although the section 3013 assessement is *mandatory,* it was not imposed on *any* of the nine counts under section 1341. Moreover, regardless of the evidence as to "thing of value" under section 875(b), Fagan would clearly be guilty of the lesser included offense of inducing and procuring Woolsey's violation of section (875(c). *Cf. United States v. Dickinson,* 706 F.2d 88, 93 (2d Cir. 1983) (discussing reduction of conviction of greater offense to lesser included offense); *United States v. Figueroa,* 666 F.2d 1375, 1380 (11th Cir. 1982); *United States v. Melton,* 491 F.2d 45, 57 (D.C. Cir. 1973).

[10] Fagan also asserts in his testimony "Summary of Argument" (but not in his "Statement of Issues" or "Argument") that "the failure of the (trial) court to grant an *in camera* hearing" on his motion for new trial and motion in arrest of judgment (*see* note 7, *supra)* "precluded an effective consultation of these motions." However, the brief contains no argument or authority in support of this contention and there is no explanation of how or why the lack of *in camera* treatment precluded effective consideration. We regard the contention as waived, and in any event are unable to discern any merit in it.

APPENDIX "B"

THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-2284

D.C. Docket No. CR-H-85-356-01

TRUE COPY I CERTIFY
ATTEST:
JESSE E. CLARK, Clerk

By: s/B. Wright
Deputy Clerk

A true copy
test: GILBERT F. GANUCHEAU
Clerk, U.S. Court of Appeals, Fifth Circuit
By: s/Signature Illegible
Deputy
New Orleans, Louisiana
Aug. 26, 1987
OP-JDT-9C
Rev. 4/85

U.S. COURT OF APPEALS
FILED
JUN 30, 1987
GILBERT F. GANUCHEAU,
Clerk

Filed Aug. 31, 1987
Jesse E. Clark, Clerk

By: s/B. Wright, Deputy

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RALPH G. FAGAN,

Defendant-Apellant,.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

Before RANDALL, GARWOOD, and DAVIS,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

June 30, 1987

ISSUED AS MANDATE: August 26, 1987

APPENDIX "C"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-2284

ENTERED FOR THE COURT:

s/Signature Illegible Garwood
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL
RULES 41 FOR STAY OF THE
MANDATE.

U.S. COURT OF APPEALS
FILED
AUG. 10, 1987
GILBERT F. GANUCHEAU
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RALPH G. FAGAN,

Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

ON PETITION FOR REHEARING

(AUGUST 10, 1987)

BEFORE, RANDALL, GARWOOD and DAVIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby *denied.*

APPENDIX "D"

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

UNITED STATES OF AMERICA

versus

RALPH G. FAGAN

CRIMINAL NUMBER H-85-356

GOVERNMENT'S MOTION IN LIMINE

COMES NOW, the United States of America by and through her United States Attorney, Henry K. Oncken and files with this Court, the Government's first Motion in Limine to preclude Defedant Fagan from raising in any manner at trial, whether or not, and under waht circumstances, Texoma Production Company suffered an economic loss as a result of the scheme to defraud.

In Defendant Fagan's motion for a Bill of Particulars, he requested in particulars, numbers "5", "6", and "7", how the alleged scheme to defraud would or did cause economic loss to the victim, Texoma Production Company of Houston. In addition, he asked for dates and amounts of such loss. In the Government's Response in Opposition to the requested particulars, we opposed the motion as it is clearly beyond the scope and purpose of Rule 7(F), Federal Rules of Criminal Procedure. In addition, the request is also legally irrelevant.

The Government invites the Courts attention to a recent decision in the Eleventh Circuit. In *U.S. v. Conover,* 772 F. 2d 765 (1th Cir. 1985), a case involving commercial bribery, the District court, on seventeen instances, excluded evidence tending to prove that the materials and/or service supplied were adequate and reasonably priced. The Eleventh Circuit indicated that it failed to see the relevancy of such evidence in a case charging bribery/ kickbacks prosecuted under the mail fraud statute, Title 18, United States Code, Section 1341. As the Court stated *at* 722:

> ". . ..whether Seminole received a good bargain as a result of this conduct simply has no bearing on whether these activities actually occurred. The district court did not err in excluding this evidence."

The same is true in the instant case. Whether or not Texoma received a good bargain as a result of the scheme is irrelevant. The fact of the matter is that they did not and that the scheme actually cost the victim substantial sums of money, because the market price, during this period, was well below that price which defendant Fagan was receiving from Texoma. However, this issue is irrelevant in the case at bar.

The Government advises the Court that should the Court determine that the "good bargain" defense is relevant to a Section 1341 prosecution, the trial in this case will extent at least four to five days longer. However, the Court should preclude any reference to the relative bargain/market issue raised by defendant Fagan. It is not relevant in this or any other Section 1341 prosecution.

Accordingly, the Government prays that the Court order Defendant Fagan (1) not to raise this issue in any manner at trial including, but not limited to, references on cross-examination of Government witness, defendant Fagan's case in chief, or in opening statement or closing argument by his trial attorneys Richard V.

Burnes, Roy Keezel, or Governor David C. Treen.

Respectfully submitted,

HENRY K. ONCKEN
United States Attorney

By: s/James Clifford Sabalos
JAMES CLIFFORD SABALOS

Assistant United States Attorney

APPENDIX "E"

18 U.S.C. 875(b)

(a) Whoever transmits in interstate commerce any demand or request for a ransom or reward for the release of any kidnapped person, shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

(b) Whoever, with intent to extort from any person, firm, association, or corporation, any money or other thing of value, transmits in interstate commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

(c) Whoever transmits in interstate commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

(d) Whoever, with intent to extort from any person, firm, association, or corporation, any money or other thing of value, transmits in interstate commerce any communication containing any threat to injure the property or reputation of the addressee or of another or the reputation of a deceased person or any threat to accuse the addressee or any other person of a crime, shall be fined not more than $500 or imprisoned not more than two years, or both.

18 U.S.C. 1512(a)

(a) Whoever knowingly uses intimidation or physical force, or threatens another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to— .

(1) influence the testimony of any person in an official proceeding;

(2) cause or induce any person to—

(A) withhold testimony, or withhold a record, document, or other object, from an official proceeding;

(B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding;

(C) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

(D) be absent from an official proceeding to which such person has been summoned by legal process; or

(3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;

shall be fined not more than $250,000 or imprisoned not more than ten years, or both.

(b) Whoever intentionally harasses another person and thereby hinders, delays, prevents, or dissuades any person from—

(1) attending or testifying in an official proceeding;

(2) reporting to a law enforcement officer or judge of the United States the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;

(3) arresting or seeking the arrest of another person in connection with a Federal offense; or

(4) causing a criminal prosecution, or a parole or probation revocation proceeding, to be sought or instituted, or assisting in such proceeding or proceeding;

or attempts to do so, shall be fined not more than $25,000 or imprisoned not more than one year, or both.

(c) In a prosecution for an offense under this section, it is an affirmative defense, as to which the defendant has the burden of proof by a preponderance of the evidence, that the conduct consisted solely of lawful conduct and that the defendant's sole intention was to encourage, induce, or cause the other person to testify truthfully.

(d) For the purposes of this section—

(1) an official proceeding need not be pending or about to be instituted at the time of the offense; and

(2) the testimony, or the record, document, or other object need not be admissible in evidence or free of a claim of privilege.

(e) In a prosecution for an offense under this section, no state of mind need be proved with respect to the circumstance—

(1) that the official proceeding before a judge, court, magistrate, grand jury, or government agency is before a judge or court of the United States, a United States magistrate, a bankruptcy judge, a Federal grand jury, or a Federal Government agency; or

(2) that the judge is a judge of the United States or that the law enforcement officer is an officer or employee of the Federal Government or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an adviser or consultant.

(f) There is extraterritorial Federal jurisdiction over an offense under this section.